called upon for his defence. An appellate court certainly has a discretion to order a retrial, or to hear further evidence, but the authorities are quite clear that when once an accused person has elected not to give evidence, he will only be permitted to call evidence which was available at the trial under very exceptional circumstances. (*Rex* v. *Watkins*, 1 Cr.A.R. 182 and *Rex* v. *Hatch and others*, 20 Cr.A.R. 181).

The only question therefore is whether in the present case the circumstances are so exceptional that the Court ought to exercise its discretion in the appellant's favour.

On this issue I take the following points into consideration:—

(1) When the charge was brought against the appellant, it was Inspector Balls' duty to investigate it, and in the course of such investigation he took a statement from the accused. Such statement is not admissible in evidence, but it is certain that such statement must have contained the accused's explanation of the manner in which he had expended the $1,536 which he had received from the complainant. Thereupon Inspector Balls quite properly suggested to the accused that it might help him if he could produce witnesses to substantiate his explanation. If these witnesses had given statements in support of the accused's explanation the papers would have been sent up to Crown Counsel in the usual way and if satisfied with the explanation he might have decided not to prosecute. At this point however Mr. Taylour came on the scene and advised his client not to produce his witnesses for examination. In the opinion of the learned District Judge Mr. Taylour did his client a disservice in giving him the advice which he did, and it certainly would appear that the learned District Judge's criticism is justified.

(2) Various defences appear to be foreshadowed in the lengthy cross-examination of the complainant and Ng Ah Tsoa, but as no evidence was called by the accused none of these defences were substantiated.

(3) The accused is a Chinese and possibly did not understand that if he accepted his counsel's advice and called no evidence he would lose the chance of ever putting his case before the Court.

In the peculiar circumstances of this case I think it might be a hardship on the accused if he were precluded from putting up his defence because his counsel misconceived the position.

I direct therefore under s. 311 of the Criminal Procedure Code that the District Judge do take the evidence of the appellant and his witnesses and certify such evidence to this Court. Bail will be extended until the appeal is disposed of.

There is one other matter to which I might refer. The learned District Judge in the course of the trial protested against the prolix cross-examination of the complainant, which lasted nearly eight hours and that of Ng Ah Tsoa. I would point out that under s. 138 of the Evidence Ordinance the cross-examination must be confined to relevant facts, but in addition, under s. 148, as the credibility of a witness is always relevant, questions may be asked in cross-examinations to test a witness' veracity or shake his credit. The Court however is entitled to disallow any questions as improper if the imputation conveyed in a question is of such a character that the truth of the imputation would not affect, or would affect in a slight degree, the credibility of the witness on the matter to which he testifies. The Court should also under s. 152 forbid any question which appears to be intended to insult or annoy, and which is needlessly offensive in form. Bearing these principles in mind, it would appear that in the course of the cross-examination of these witnesses there were many occasions upon which the learned District Judge, instead of protesting, might have exercised his discretion and disallowed certain questions.

Order Accordingly.

Solicitors for the appellant—

Braga & Taylour.

[ORIGINAL CIVIL JURISDICTION]

TERRELL, Ag. C.J.

August 18, 1937.

H. R. L. DYNE

v.

BADARIAH HANIM BINTE ABDULLAH.

[SINGAPORE SUIT No. 82 of 1937]

Limitation Ordinance (Cap. 16)—Contract of guarantee—Article 95.

By a contract a guarantor guaranteed the payment of certain sums within two months from the date thereof, the judgment creditor agreeing to take no steps to enforce his rights under the judgment for two months.

Held, that article 95 was the appropriate article applicable in the schedule to the Limitation Ordinance and that as the appropriate period was 6 years the claim of the judgment creditor against the guarantor was not barred by limitation.

Semble, the meaning of the word "compensation" in the Indian Limitation Act is a meaning which the Courts in British India have given to the word from the construction of that Act itself. As the Limitation Ordinance of the Colony is derived from the Indian Act, the word "compensation" in such ordinance should bear the same meaning as it bears in the Indian Act, especially as it is not a term of art.

TRIAL OF ISSUE.

Smith for plaintiff.

Johannes for defendant.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

TERRELL, AG. C.J.—This was the trial of an issue whether the plaintiff's claim was barred by limitation.

The action is founded on an agreement for guarantee signed by the plaintiff and the defendant on the 21st July 1932. The agreement recited a judgment obtained by the plaintiff against one Sadullah Khan and a request by the defendant that the plaintiff should not proceed under the judgment for two months upon the defendant entering into such covenant as was thereafter contained. The operative part of the agreement reads as follows:—

> "NOW THIS AGREEMENT WITNESSTH that in pursuance of the said agreement and in consideration of the premises the Guarantor hereby guarantees the payment by the said Sadullah Khan bin Hamidullah Khan to the Judgment Creditor of the said sum of Dollars Five thousand four hundred and twenty four and Cents seventeen ($5,424.17) and Dollars Seventy seven and Cents eight ($77.08) together with interest on the said two sums at the rate of 8% from the date of the said Judgment within two months from the date hereof and the Judgment Creditor hereby covenants that he will take no steps for a period of two months from the date hereof to enforce his rights under the said Judgment."

The plaintiff originally claimed the sum of $7,447.43 and interest as 'money due' but subsequently amended his statement of claim and claimed in the alternative as follows:—

> "Alternatively, the plaintiff's claim is for $7,447.43 being compensation payable by the defendant to the plaintiff for breach by the defendant of the contract in writing of the 21st July 1932 referred to above."

Various defences were set up, but the only defence relevant to this issue is the plea of limitation, and the question arises which article of the Limitation Ordinance is applicable.

It is common ground that there is no article specifically dealing with a guarantee as such, although there are articles dealing with "Indemnity" and "Bond." In certain respects a contract of guarantee resembles a contract of indemnity, but not primarily so. A contract of guarantee is a contract to perform the promise or discharge the liability of a third person in case of his default. A contract of indemnity is a contract to indemnify a person against liability which may or may not have to be made. I feel no doubt that the guarantee in the action cannot properly be described as a "contract to indemnify" within the meaning of Article 65.

Nor is it a Bond. A bond is defined in s. 2 of the Ordinance to include "any instrument whereby a person obliges himself to pay money to another on condition that the obligation shall be void if a specified act is performed or is not performed, as the case may be."

No condition is expressed in the guarantee under consideration but Mr. Johannes argued that there was an implied condition that the guarantee should be void if payment were not made within two months. I feel, however, that in the case of a formal document it is impossible to imply a condition of this kind, when it is not expressed.

The two articles which appear to be most nearly applicable are Articles 47 and 95, and it is common ground that if Art. 47 applies the claim is barred and if Art. 95 applies it is not barred. These articles read as follows:—

> "47. For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.
> 95. For compensation for the breach of a contract in writing."

The applicability of these articles in the case of a guarantee in writing was fully considered by the F.M.S. Court of Appeal in the case of the *Kwong Yik (Selangor) Banking Corporation Limited* v. *The Malayan Daily Express (1926) Limited and others*, II M.L.J. p. 198 and I propose to follow the principles there laid down. In that case four persons guaranteed as follows:

> "Payment shall be made to you (the Bank) of all moneys which may at any time be due to you from the Firm (the 1st defendant) on the general balance of its account with you etc."

The Court held that in this particular form of guarantee there was no 'specified time' and no 'specified contingency' so as to bring the guarantee under Art. 47. The Court also held that Art. 65 (contract to indemnify) was not applicable for reasons similar to those stated above; and that the guarantee in question could not fall under Art. 47 or 65 without straining the language. The Court accordingly held that Art. 95 should be applied, as there was no other article strictly applicable.

The guarantee in the present case is very different from the guarantee in the case cited and the only safe course is to examine the actual wording of the guarantee with a view to deciding whether Art. 47 is applicable.

It will be seen that in the guarantee now before the Court there is a specified time—the period of two months—or at all events a specified contingency—the failure of the principal debtor to pay the judgment debt within two months. The reasons therefore which prevailed on the

Court to reject Art. 47 in the *Kwong Yik Bank* case do not apply in the present case. On the other hand, in the *Kwong Yik Bank* case there was a "promise to do something," viz., to pay the money owing to the Bank. In the present case the defendant does not promise to do anything—she promises that the principal debtor shall pay the debt,—which is something quite different, and such promise cannot, I think, be brought within the ambit of Art. 47 without straining the language.

I find accordingly that Art. 95 is the article applicable. This article does not speak of "a promise to do anything" but of the "breach of any contract," and undoubtedly there has been the breach of a contract, because the principal debtor has not paid.

It was argued, however, that the word 'compensation' has a particular meaning, namely, 'statutory damages' (see *Arnold* on Compensation or damages pp. 7 and 8), and that it is only in British India, by virtue of the Contract Act (s. 73) that the meaning of 'compensation' is extended to include any payment which a party would be entitled to claim on account of any loss or damage arising from breach of contract (*Mitra* 6th ed. p. 1422). But the definition in the Indian Contract Act is not found in the Indian Limitation Act, and the meaning attached to 'compensation' in the Limitation Act is a meaning which the Courts in British India have given to the word from the construction of that Act itself. As our Limitation Ordinance is derived from the Indian Limitation Act, it is surely not unreasonable to give the word the same construction as it bears in the Indian Act, especially as 'compensation' is not a term of art, and in its ordinary meaning can well be held to include damages for breach of contract.

If, however, Mr. Johannes is right in his contention then his argument will exclude, not only Art. 95, but also Art. 47, which likewise speaks of 'compensation.' In the result there would be no special article applicable and recourse would have to be had to the 'omnibus' Article No. 97. The period of limitation under Art. 97 is six years, and the result would be the same as if Art. 95 applied.

In my opinion therefore the claim is not barred by limitation, and the plaintiff succeeds upon the issue before the Court. The defendant must pay the costs of the issue: such costs to be plaintiff's in any event.

Order accordingly.

Solicitors for the plaintiffs—*Donaldson & Burkinshaw.*

Solicitors for the defendant—*Johannes & Sammy.*

[APPELLATE CRIMINAL JURISDICTION]

TERRELL, Ag. C.J.

Sept. 18, 1937.

REX v. WONG PENG.

[SINGAPORE MAGISTRATE'S APPEAL No. 69 of 1937].

Importation of Textiles (Quotas) Ordinance (Cap. 162), s. 7 sub—s. 1—Importing artificial Japanese silk otherwise than under licence.

The Importation of Textiles Quotas Ordinance does not cause any presumption to arise from the fact of possession of unlicensed textiles. S. 115 of the Evidence Ordinance cannot be used to raise the presumption that a person in possession of unlicensed textiles himself imported them. Even if the possessor knows that they had been wrongfully imported by someone else, that is not an offence under the Ordinance.

MAGISTRATE'S APPEAL.

Menon for appellant.

Storr, Crown Counsel for respondent.

The facts and arguments appear sufficiently from the judgment.

At the conclusion of the hearing the Court allowed the appeal and delivered its grounds of judgment.

TERRELL, AG. C.J.—The accused was charged under s. 7 sub-s. 1 of the Importation of Textiles (Quotas) Ordinance (Cap. 162) with importing artificial silk of Japanese manufacture otherwise than under a licence issued by the Registrar. He was convicted and fined.

The goods were not found in the accused's possession, but in the possession of an Indian dealer, who had obtained them from the accused. It is to be observed that the possession or sale of unlicensed textiles is not an offence under the ordinance. The only offence of which the accused could be convicted was that of "importing," and of that there was no evidence whatever, except the fact that at one time the goods were in his possession. Further, the Ordinance makes no presumption from the fact of possession, and Crown Counsel in support of the conviction could only rely on the presumption supplied by s. 115 of the Evidence Ordinance, illustration (a) which reads:—

> "The Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief, or has received the goods knowing them to be stolen, unless he can account for his possession."

I do not think that this section can be used to raise a presumption that a person in possession of unlicensed textiles himself imported them. If it raises the presumption that he knew that they had been wrongfully imported by someone else. that is not an offence under the Ordinance.